Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1998

DANIEL BENITO,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE STATE OF NEW YORK, COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether a defendant is denied his constitutional right to a fair trial when, at the trial he is shackled after he assures the trial court that he would behave?

PARTIES TO THE PROCEEDING

The parties to the proceedings are those named in the caption.

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In the Supreme Court of the United States
OCTOBER TERM, 1998

DANIEL BENITO,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE STATE OF NEW YORK COURT OF APPEALS

The petitioner, Daniel Benito petitions for a Writ of Certiorari to review an order of the State of New York Court of Appeals denying his application for leave to appeal.

CITATION TO OPINION BELOW

The Decision of the New York State Appellate Division: First Department appears in the Appendix hereto. The order of the New York State Court of Appeals denying a leave to appeal also appears in the Appendix hereto.

JURISDICTION

The Order of the Court denying leave to appeal was entered on February 1, 1999. The Jurisdiction of this Court is

invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A judgment was rendered on July 25, 1995 in Supreme Court, New York County (Snyder, J.), convicting Daniel Benito, after a jury trial, of Robbery in the First Degree (New York Penal Law §160.15), Burglary in the First Degree (New York Penal Law §140.17), Unlawful imprisonment in the First Degree (two counts)(New York Penal Law §135.10) and Intimidating a Witness in the Third Degree (New York Penal Law §215.15). Petitioner was sentenced as a predicate violent felony offender to a term of twenty-five (25) years' to life imprisonment on the robbery conviction and burglary conviction, and two (2) years' to life imprisonment on the remaining two convictions. These sentences were all imposed to run concurrent to each other but consecutive to any time owed to parole.

During the trial, court ordered that petitioner wear shackles throughout the trial proceedings and in full view of the jury. Despite the plea of defense counsel, the trial court ruled that due to petitioner's prior misconduct, including ripping up documents in the courtroom and threatening his previous attorney, that petitioner would remain shackled during the trial proceedings (T. 3)[1]. The trial court elected to maintain the shackling of petitioner despite his promise to behave himself and his personal request to have the handcuffs removed (T.4,5).

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1. "T" refers to pages of the trial transcript.

MR. SHEINBERG: He informed me that he will behave himself. He will not say anything. He just wants to sit and read and use his pad to write down information. So I will leave it up to your Honor (T. 2).

THE COURT: Well, I think you should step out and tell him that it is possible that he will be here.

All right. Now, the defendant is now present along with everyone else except the jury. I am happy to have you back. However, I want you to understand the moment you act out you are leaving the courtroom. I don't want to hear one word from you. You could speak to your lawyer quietly. I don't want to hear one word. I don't want you to make any gestures, tear up any papers, do you understand me?

THE DEFENDANT: Yes, Ma'am.

THE COURT: I don't want to hear one comment. The prosecution is going to make an opening statement in a little while and maybe you won't like what you are going to hear because they are going to outline the proof they have in this case. I don't care if you like it or not you will keep quiet. Do you understand me?

THE DEFENDANT: Yes.

THE COURT: If you feel you can't do that let

me know and I will have you removed from the courtroom and we will continue with the audio visual system. I welcome you to the courtroom if you behave yourself, otherwise you will not be allowed to be here is that clear?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you think you can behave yourself?

THE DEFENDANT: I know I can.

THE COURT: You know you can. Thus far unfortunately you have proven that to be totally wrong, but we will try again.

THE DEFENDANT: Is it possible that I could get my handcuffs taken off?

THE COURT: No, in view of everything that has occurred I don't want your lawyer assaulted or anyone else.

The jury will come in now and I will give them the admonition about the cuffs and everything else that we discussed. Of course, I didn't give it yesterday because the defendant was not here.

Stay over there at the end of the table. If you need to talk to your lawyer you will do that.

(T. 3-5)

Thereafter, the court instructed the jury about petitioner's restraints:

> *THE COURT:* Now, you may have observed that the defendant is restrained. The defendant shackles must be disregarded by you and you are not to draw any inference or conclusion from the fact that the defendant is shackled. You are to decide this case solely and wholly on the evidence presented. The shackling has no bearing on the guilt or lack of guilt of this defendant. Thank you.

(T. 6)

In an appeal to the New York State, Appellate Division: First Department, that court held that despite petitioner's promise of good behavior, the trial court did not abuse its discretion in having petitioner shackled:

> A review of the record indicates that the circumstances presented to the court permitted the court's discretionary use of shackles to restrain defendant and maintain order in the proceedings (*People v. Mendola*, 2 NY2D 270, 276-277). The court was not required to accept defendant's promise of good behavior where such promises had proved unreliable before (see, *People v. Harding*, 243 AD2d 401, *lv denied* 91 NY2d 874). Additionally, the record indicates that the shackles were hardly noticeable, that the

> jury had witnessed defendant's misconduct in the courtroom, and that the court issued appropriate instructions to the jury to minimize any potential prejudice to defendant. In the circumstances, there is no support for defendant's claim of undue prejudiced (*see*, *People v. Palermo*, 32 NY2d 222, 226; *see also*, *People v. Bailey*, 205 AD2d 789, *lv denied* 84 NY2d 822).

On February 1, 1999, the New York State Court of Appeals denied petitioner leave to appeal.

REASONS FOR GRANTING THE WRIT

1. The decision below raises a significant federal and state question: whether a defendant is denied his constitutional right to a fair trial when, at his trial he is shackled after assuring the Court that he would behave.

The fundamental unfairness of the jury seeing a defendant restrained was recognized by this Court in *Illinois v. Allen*, 397 U.S. 337 (1970). This Court in *Allen* held that

> the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affirm to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold

Id. at 343.

This Court also held that to contemplate trying a defendant for a crime while he sits bounds and gagged before the judge and jury should be the last resort of the trial court. *Id.* at 344. In *Holbrook v. Flynn*, 475 U.S. 560 (1986), this court once again characterized the use of shackles upon a defendant before a jury as "inherently prejudicial." *Id.* at 568.

Following the lead of this Court, the New York Court of Appeals and this Court have repeatedly held that a defendant is presumed to be innocent and is therefore entitled to appear in a court of law with the dignity and self-respect of a free and innocent man. *People v. Mendola*, 2 N.Y.2d 270 (1957); *People v. Lopez*, A.D.2d 658 (1st Dept. 1994). In *Lopez*, this Court held that the display of security measures impinged upon the defendant's due process right to the presumption of innocence at trial. Moreover, this Court also went on to hold that even if it were to accept the proposition that the error did not deprive the defendant of his right to accept the proposition that the error did not deprive the defendant of his right to a fundamentally fair trial, harmless error analysis is not the appropriate standard of review. *Id.* at 658. The presentation of a defendant in this manner. The defendant is forced to overcome this inference of guilt which goes against one of the most basic tenets of the American criminal justice system; that the prosecution bears the burden of proving, beyond a reasonable doubt that the defendant is guilty of the crimes with which he has been charge. By showcasing appellant in shackles before the jury, the trial court sanctioned the creation of the inference that appellant was guilty, thereby giving the prosecution a head start in satisfying their burden.

It is well-settled that a trial court has the responsibility of maintaining order dignity during a trial and "this may not be impaired by the contumacious acts of a defendant." *People v. Palermo*, 32 N.Y.2d 222 (1973). A defendant, however, may

not be held in shackles in the presence of the jury unless that there is a rational or justifiable basis which has been articulated on the record. *Lopez,* 207 A.D.2d at 658.

In *Palermo*, the defendant was warned prior to being gagged and upon his concession to behave properly, the gag was removed. Here, however, appellant, as well as his counsel requested that the shackles be removed and made promises to the trial court that he would behave (T. 5). This should have been sufficient to convince the trial court to remove the shackles. In *Palermo,* the Court of Appeals also held that "whenever practicable, sanctions directed for the maintenance of order should be imposed outside the presence of the jury... once the gold of preserving order and decorum is achieved, every reasonable effort should be made to minimize the possibility of prejudice." *Id.* at 879.

The only way that the trial court in the case at bar could have minimized the possibility of prejudice to petitioner would have been to remove the shackles, following petitioner's request and his promise to behave himself, prior to the entrance of the jury. Instead, without warning, the trial court forced petitioner to wear the shackles in the jury's presence, thus leading to the great prejudice which the trial court is supposed to avoid wherever possible. *Compare*, *People v. Byas,* 173 A.D.2d 314 (1st Dept. 1991), *lv. denied, 78 N.Y.2d 1126 (1991)* (Defendant knowingly and voluntarily waived his right to be present at the hearing and trial by his abusive behavior directed toward his appointed counsel and the court, by insisting that he did not wish to be present, and by stating that he would continue to act up" if compelled to remain in the courtroom. (*Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674)).

The New York State Court of Appeals in *Palermo* also held that any objection to the binding and gagging of a

defendant on the ground that it would carry some stigma a guilt is not warranted where the jury is cognizant of the reasons for having the defendant restrained. *Id.* at 878-79. Here, the jury was not apprised of the reasons for petitioner being continuously shackled. The jury had not witnessed any inappropriate behavior by appellant and, therefore, the jurors were left to guess as to why petitioner was being restrained before them. Indeed, during the course of the trial, petitioner acted in an appropriate and dignified manner.

Hence, the use of restraints in this case where petitioner gave clear assurances that his disruptive behavior would not continue entitles him to new trial.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the New York State Court of Appeals.

Respectfully Submitted.

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Tom, J.P., Mazzarelli, Andrias, Saxe, JJ.

3149 The People of the State of New York,
Respondent,

-against-

Daniel Benito,
Defendant-Appellant.

Peter Hinckley
Barry M. Fallick

Judgment, Supreme Court, New York County (Leslie Crocker Snyder, J.), rendered July 26, 1995, convicting defendant, after a jury trial, of robbery in the first degree, burglary in the first degree, intimidating a victim or witness in the third degree, and unlawful imprisonment in the first degree (two counts), and sentencing him, as a persistent violent felony offender, to concurrent terms of 25 years to life on the robbery and burglary convictions, and 2 to 4 years on the remaining convictions, unanimously affirmed.

A review of the record indicates that the circumstances presented to the court permitted the court's discretionary use of shackles to restrain defendant and maintain order in the proceedings (*People v Mendola,* 2 NY2d 270, 276-277). The court was not required to accept defendant's promise of good behavior where such promises had proved unreliable before (*see, People v Harding,* 243 AD2d 401, *lv denied* 91 NY2d 874). Additionally, the record indicates that the shackles were hardly noticeable, that the jury had witnessed defendant's misconduct in the courtroom, and that the court issued

appropriate instructions to the jury to minimize any potential prejudice to defendant. In the circumstances, there is no support for defendant's claim of undue prejudice (*see, People v Palermo,* 32 NY2d 222, 226; *see, also, People v Bailey,* 205 AD2d 789, *lv denied* 84 NY2d 822).

Defendant's claim of prejudice due to late delivery of *Rosario* material is unsupported by the record and the court properly denied defendant's request for a mistrial. In this connection, the record establishes that late delivery of any *Rosario* material was not due to bad faith on the part of the prosecutor, and that the court eliminated any possible prejudice to defendant by precluding the People from taking advantage of the material and by offering defense counsel the opportunity to recall any relevant witness for further questioning with the benefit of the material in question (*see, People v Leidinger,* 196 AD2d 688, *lv denied* 82 NY2d 851).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: December 22, 1998

CLERK

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. JOSEPH W. BELLACOSA

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

DANIEL BENITO,

Appellant.

I, JOSEPH W. BELLACOSA, Judge of the Court of Appeals of the State of New York, certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and for a hearing and upon the record and proceedings herein, * there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal and for a hearing are hereby denied.

Dated at Albany, New York
February 1, 1999

Judge

*Description of Order:

Order of the Appellate Division, First Department, entered December 22, 1998, affirming a judgment of the Supreme Court, New York County, rendered on July 26, 1995.